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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1065

MADALYN MURRAY O'HAIR

Petitioner

VS.

STATE OF TEXAS

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, State of Texas, herewith respectfully prays that the Petition for Writ of Certiorari filed by Petitioner be denied for the reason that the decision of the United States Court of Appeals for the Fifth Circuit was consistent with the applicable decisions of the United States Supreme Court and all other federal courts which have examined the question of the appropriate-

ness of the removal of state criminal prosecutions pursuant to 28 U.S.C. § 1443(1), and in support of which, the State of Texas would show the Honorable Court the following:

Petitioner O'Hair, the defendant in the state criminal prosecution sought to be removed to the United States District Court for the Western District of Texas, Austin Division, is not entitled to have the criminal proceedings filed against her removed from state court. The consistent holdings pertaining to the removal statute, 28 U.S.C. § 1443(1), require that removal of a criminal action may be granted only upon satisfaction of a two-pronged test: (1) the right upon which the petitioner relies must be a right under a federal law providing for civil rights stated in terms of racial equality; and (2) it must appear that the petitioner is denied or cannot enforce the specified federal rights in the courts of the state. *Georgia v. Rachel*, 384 U.S. 780 (1966); *Johnson v. Mississippi*, 421 U.S. 213 (1975).

In *Rachel*, the Supreme Court analyzed 28 U.S.C. § 1443(1) and determined that a person seeking removal of a state prosecution must satisfy both requirements of the subsection. A petitioner "must show both that the right upon which [he relies] is a 'right under any law providing for...equal civil rights' *and* that [he is] 'denied or cannot enforce' that right in the [state court]." *Georgia v. Rachel, supra*, 384 U.S. at 788 (emphasis supplied). The Supreme Court concluded that "the phrase 'any law providing for...equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." *Id.*, 384 U.S. at 792. In *Johnson v. Mississippi*, the Court again recognized and applied the two-pronged test as stated in *Georgia v. Rachel*. *Johnson v. Mississippi, supra*, 421 U.S. ar 219f.

Petitioner O'Hair cannot satisfy the first prong of the test for removal of the Texas criminal proceeding. She has made no allegation in her Petition for Removal that she is being denied a right under any federal law providing for racial equality. In *Johnson*, the Court stated that broad allegations of violations of constitutional rights of general applicability are insufficient to justify removal under 28 U.S.C. § 1443(1). *Id.* at 219. Failing to recognize the necessity for specific allegation of a right under any federal law providing for equal civil rights, Petitioner O'Hair has attempted to rely strictly on broad allegations that she is denied and cannot enforce in the state court rights secured to her by Amendments I, VI, and XIV of the United States Constitution and the right to a republican form of government in the State of Texas, as secured by Article IV, Section 4 of the United States Constitution. See, Petition for Removal, Paragraph 4.

Although the decision of the United States District Court did not require the Court to discuss the second prong of the *Rachel-Johnson* test, it is clear that Petitioner O'Hair cannot satisfy the second prong of the test. The broad allegations made by O'Hair to support removal can

prove no more successful than the allegations contained in the petitions for removal dealt with in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the companion case to *Georgia v. Rachel, supra*. In *Peacock*, the persons seeking removal alleged that they were charged with various offenses under state law because they were Negroes or they were attempting to help Negroes assert their rights under federal equal civil rights laws. Yet, none of the petitioners in *Peacock* relied upon specific provisions of a pre-emptive federal civil rights law. The Supreme Court distinguished the *Peacock* case from *Rachel* in "two significant respects":

> First, no federal law confers an absolute right on private citizens- on civil rights advocates, on Negroes, or on anybody else-to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges.

City of Greenwood v. Peacock, 384 U.S. at 826-827. Accordingly, the Court refused to permit removal of such criminal prosecutions for failure to satisfy the second prong of the test enunciated in *Rachel*. Petitioner O'Hair also falls short in meeting the requirement of the second prong of the *Rachel* test. In her Petition for Removal, O'Hair alleges no specific federal right which confers on her the right to disrupt a lawful meeting, nor does she allege a federal law conferring immunity from state prosecution on such charge. Consequently, removal is not appropriate in this case.

Petitioner O'Hair's reliance on *Regents of the University of California v. Bakke*, 429 U.S. 953 (1978), is inappropriate. Assuming *arguendo* that *Bakke* destroys the viability of the first prong of the *Rachel-Johnson* test as it pertains to a right stated in terms of racial equality, the test is stated in the conjunctive. Persons desiring to remove state criminal proceedings would continue to be required to satisfy the second requirement. In the instant case, Petitioner must allege facts sufficient to make it appear that she will be denied or cannot enforce specified federal rights in the Texas courts. As has been stated above, O'Hair has wholly failed to meet the requirements of the second prong.

Petitioner O'Hair attempts to rely upon Article I, Section 4 of the Texas Constitution as being a pervasive state law which on its face shows that she will be denied or that she cannot enforce her federal rights in the state courts in Texas. There is not the ability to clearly predict that O'Hair's federal rights will be denied by the criminal prosecution in the state court. The policy behind the removal statute is not to bring every state prosecution which could conceivably involve a federal constitutional question into the federal courts for adjudication. In fact, as

the Supreme Court reaffirmed in *Johnson v. Mississippi, supra,* 412 U.S. at 220, and stated originally in *City of Greenwood v. Peacock:*

> The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethern of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

City of Greenwood v. Peacock, supra, 384 U.S. at 828.

It is therefore, evident that removal of the Texas prosecution is not available to Petitioner O'Hair in this case. Accordingly, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, James L. McMurtry, attorney for the State of Texas, hereby certify that on February 1, 1980, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Madalyn Murray O'Hair by mailing the requisite copies in a duly addressed envelope, with postage prepaid to:

Paul D. Funderburk
American Atheist Center
2210 Hancock Drive
Austin, Texas 78756

James L. McMurtry